Office - Supreme Court, U.S.
FILED
MAR 27 1957
JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 370

THE BALTIMORE AND OHIO RAILROAD COMPANY,
*Petitioner,*

v.

DANIEL T. JACKSON, *Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF FOR THE PETITIONER

STEPHEN AILES
LAIDLER B. MACKALL
1100 Shoreham Building
Washington 5, D. C.
*Attorneys for Petitioner*

STEPTOE & JOHNSON
*Of Counsel*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX


| | Page |
|---|---|
| Introductory Statement | 1 |
| I. The Question Presented | 2 |
| II. Unprecedented Use of the Vehicles | 4 |
| III. Administrative Interpretation of the Commission | 4 |
| Appendix | 7 |


## CITATIONS

CASES:


| | |
|---|---|
| *Baltimore and Ohio Railroad Company* v. *Jackson*, 233 F.2d 660 (D.C. Cir. 1956) | 2 |
| *Ex Parte No. 179*, 297 I.C.C. 177 (1955) | 4, 5, 7 |
| *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U.S. 57 (1934) | 5 |
| *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926) | 5 |


STATUTES:


| | |
|---|---|
| Boiler Inspection Act (45 U.S.C. §§ 22-34) | 5 |
| Safety Appliance Act (45 U.S.C. §§ 1-16) | 1, 2, 3, 4, 5, 6 |
| 45 U.S.C. § 6 | 3, 4 |


MISCELLANEOUS:


| | |
|---|---|
| Rule 23(1)(c), Revised Rules of The Supreme Court of the United States | 3 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

---

No. 370

---

THE BALTIMORE AND OHIO RAILROAD COMPANY,
*Petitioner,*

v.

DANIEL T. JACKSON, *Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## REPLY BRIEF FOR THE PETITIONER

---

Respondent's brief is devoted principally to an assertion of the general proposition that the Safety Appliance Act must be construed liberally in favor of railroad employees, a proposition which does not furnish a basis for deciding this specific case. Several points raised in Respondent's brief, however, relate to matters not discussed in Petitioner's original brief and accordingly merit comment in reply.

## I.

## THE QUESTION PRESENTED

While Respondent does not appear to press seriously his assertion that the writ should be dismissed, his characterization of the question presented involves something in the nature of a claim of surprise that he should have to face the basic question whether the Safety Appliance Act applies to these small maintenance vehicles at all.

[An] instruction in the case informed the jury that the Safety Appliance Act required a hand brake on the truck and a train brake system for both vehicles (R. 74); it was objected to on the ground that the Act did not apply (R. 16, 19). At each stage of the proceeding, petitioner has contended, stating the simpler proposition first: (1) that the Section 6 exemption applies, and (2) that the motor track car was not a "locomotive" under the Act. This second argument was presented to and passed on by the Court of Appeals.[1] It was again urged in the Petition for Certiorari, pp. 13-16.

In the Petition, the question itself states the basic issue of applicability of the Act:

---

[1] *Baltimore and Ohio Railroad Company* v. *Jackson*, 233 F.2d 660, 664 (D.C. Cir. 1956)

> "Appellant also argues that the motor track car in question is not covered by the act's § 1 requirement for air brakes and a train brake system (brakes on all cars which can be controlled from locomotive) because the car is not used to haul *standard railroad cars* and is, therefore, not a locomotive.
>
> "We find nothing in the authorities cited by appellant which leads to a conclusion that a vehicle is a 'locomotive' only if it is actually used to haul standard railroad cars."

> "In view of this express exemption, is the Safety Appliance Act applicable to four-wheel railroad motor track cars and push trucks"? (Pet. 2)

The first sentence of the Statement in the Petition is as follows:

> "This case presents the single important question whether or not the Safety Appliance Act applies to the four-wheel motor track cars and push trucks." (Pet. 3)

Presumably, petitioner can make its argument in any order which it chooses, with the emphasis anywhere it decides to place it, and can marshal every legal contention available to it in support of this proposition that the instruction incorrectly applies the Safety Appliance Act.

Respondent's contention would be without substance even if the Section 6 argument were the only argument previously made or if the question had been limited to the applicability of Section 6. Rule 23(1)(c) of the Rules of this Court provides in part:

> "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the question set forth in the petition or fairly comprised therein will be considered by the court."

The argument that the vehicles involved here were never within the scope of the Act in the first instance is not only "fairly comprised" within the question presented, but it is logically antecedent to the problem of the applicability of the Section 6 exemption. If a motor track car is not a "locomotive" nor a push truck a "car," the question of their exemption from the Act can never be reached. Only if it is decided

that Congress intended these vehicles to be within the scope of the Act can the question of their exemption under Section 6 arise.

## II.

## UNPRECEDENTED USE OF THE VEHICLES

Respondent's contention that motor track cars are not customarily used to haul push trucks, made first in its Brief in Opposition to Certiorari, has now been qualified by addition of the phrase "on any other railroad." This wholly unrealistic argument has been treated with possibly more attention than it deserves in Petitioner's Reply to the Brief in Opposition to granting the writ.

## III.

## ADMINISTRATIVE INTERPRETATION BY THE COMMISSION

The Commission's consistent interpretation of the Act with regard to motor track cars and push trucks has not deviated in sixty-three years. That position is uncontradicted on the record (R. 90-91) and is clearly and unequivocally stated by the Commission itself in both of its briefs filed in this case. Respondent now states that despite a hesitancy "to question the sincerity of the Interstate Commerce Commission in its position here" he is "astounded by the inconsistency of this position with its own action and holding in a *comparable* situation." [Italics added]. Respondents' Brief at 22-23. The reason given for his astonishment is a part of a paragraph taken out of context from the Commission's opinion in *Ex Parte No. 179*, 297 I.C.C. 177.

Even a cursory reading of *Ex Parte No. 179*, shows that it dealt *only* with multiple-unit equipment, the

large electric-powered *regular passenger cars* operated in trains by the Long Island Railroad, the Hudson & Manhattan, and other interurban lines. These units are no more related to motor *track* cars than an old-fashioned steam locomotive is. Throughout the entire proceeding in *Ex Parte No. 179* there was no mention of or reference to either motor track cars or push trucks. Nor was consideration given to any type of railroad equipment other than multiple-unit equipment used in trains for the regular carriage of passengers and freight. While the language quoted out of context by Respondent may seem at first blush to support his contention, a reading of all of the pertinent section of the opinion, 297 I.C.C. 187-193, demonstrates its irrelevance. For the convenience of the Court, this section of the opinion is printed in its entirety as an Appendix to this Reply Brief.

Also with regard to the Commission's interpretation of the Act, Respondent appears to be making the argument that, since the Commission has refused to act in the regulation of motor track cars and push trucks, the states are free to regulate in this area until the Commission does. No rational argument is offered to support this conclusion. It would seem that none could be offered after the clear pronouncement of this Court that Congress had occupied the entire field of locomotive regulation in the Boiler [Locomotive] Inspection Act, *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605, and the later statement of this Court in *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U.S. 57, 60:

> "The Safety Appliance Acts govern common carriers by railroad engaged in interstate commerce. . . . *So far as the safety equipment of such vehicles is concerned, these Acts operate to exclude state*

*regulation whether consistent, complementary, additional or otherwise.*" [Italics added]

The import of this passage is unmistakable. If motor track cars and push trucks are vehicles to which the Act applies, all of the extensive state regulation of these vehicles must fall.

Respectfully submitted,

STEPHEN AILES
LAIDLER B. MACKALL
*Attorneys for Petitioner*

STEPTOE & JOHNSON
*Of Counsel*

March 27, 1957

## APPENDIX

## INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 179[1]

# RULES AND INSTRUCTIONS FOR INSPECTION AND TESTING OF MULTIPLE UNIT EQUIPMENT

NEW YORK CENTRAL RAILROAD COMPANY
LONG ISLAND RAILROAD COMPANY (William Wyer, Trustee)
DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY
BALTIMORE AND OHIO RAILROAD COMPANY
(STATEN ISLAND RAPID TRANSIT RAILROAD COMPANY)
ILLINOIS CENTRAL RAILROAD COMPANY
NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
PENNSYLVANIA RAILROAD COMPANY
READING COMPANY

Decided October 25, 1955

. . . . . .

Consideration will next be given to the petition of the Hudson & Manhattan Railroad Company. This petitioner argues that the provisions of the Locomotive Inspection Act, as amended, do not apply to multiple-unit equipment so that the Commission is without authority for the prescription of the rules under consideration and that the order of October 23, 1953, redefining a locomotive so as to include multiple-unit equipment is invalid and not promulgated and issued pursuant to the provisions of section 4 of the Administrative Procedure Act. It contends that its equipment does not fall within the definition of a locomotive and that Congress, in fact, did not intend to confer on the Commission jurisdiction and authority to determine rules and instructions for the inspection and testing

[1] This report embraces also Ex Parte No. 179, petition for reconsideration of the Hudson & Manhattan Railroad Company (Herman T. Stichman, trustee).

of motorcars and electrically operated units designed to carry passengers and operated by a single set of controls. Aside from the question of jurisdiction, petitioner argues that such order of October 23, 1953, was invalid since it was issued without notice and opportunity for hearing as required by the Administrative Procedure Act.

In its exceptions to the examiner's reports, this carrier questions the propriety of the examiner's reference to the authority for the prescription of these rules as the Locomotive Inspection Act, it being its contention that the proper designation should be the "Boiler Inspection Act." As originally approved on February 17, 1911, the act in question was enacted as the Boiler Inspection Act (section 22, title 45 of the United States Code Annotated) since it established a general safety standard for locomotive boilers only. Thereafter, on March 4, 1915, the original act was amended to include not only the boiler, but also the locomotive and tender, and all parts and appurtenances thereof. Later, by the amendment of April 22, 1940, the title of chief inspector and assistant chief inspector of locomotive boilers was changed to director and assistant director of locomotive inspection. These changes indicated that the nomenclature "Boiler Inspection Act" was too restrictive, and the broader term "Locomotive Inspection Act" was applied and is the popular name by which this act is known. The Commission's annual reports refer to this act as the Locomotive Inspection Act. Acts supplementary to the Interstate Commerce Act, as well as pamphlets prepared by the Commission, designate the act in question as the Locomotive Inspection Act. It is of some significance that this petitioner in its petition for reconsideration also referred to this act as the Locomotive Inspection Act, and it was not until it filed its exceptions to the examiner's reports that it raised the question of improper reference thereto. Under the circumstances, it does not appear that this petitioner was prejudiced or otherwise misled as to the authority under which these rules and instructions

for inspection and testing of multiple-unit equipment were prescribed. Hereinafter reference to the Locomotive Inspection Act will include the Boiler Inspection Act.

For a better understanding of the jurisdictional and procedural issues involved, a recitation of the events leading up to the inception of this proceeding is advisable. On March 5, 1941, an order entitled "Proposed Rule Making" was entered in response to a complaint and petition filed by the Brotherhood of Locomotive Engineers on December 7, 1950, and a petition filed by the Brotherhood of Locomotive Firemen and Enginemen on January 24, 1951. The Hudson & Manhattan filed a motion on January 22, 1951, for dismissal of the complaint on the ground that the Commission lacked jurisdiction under the Locomotive Inspection Act over the equipment operated by it and on the further ground that petitioner was exempt from the provisions of the act because of its exempt status, contending it fell within the exemption as a street, suburban, interurban electric railway not operated as a part of a general railroad system of transportation. The order of March 5, 1951, specifically provided that all class I railroads subject to the Interstate Commerce Act were respondents, and each was served with a copy thereof. Notice to the general public was made by depositing a copy with the secretary of the Commission and by filing a copy with the Director, Division of the Federal Register. Petitioner's motion for dismissal of the above complaint was denied without prejudice to its subsequent renewal.

Thereafter the Commission prepared and circulated certain proposed rules and instructions to the respondents and labor organizations inviting their comments. These rules specifically provided that they shall apply to electrically operated units designed to carry freight and/or passenger traffic in multiple-unit service operated by a single set of controls, which were defined as (1) unit or units with propelling motors, control apparatus, and one or more con-

trol stands; (2) unit or units with propelling motors and control apparatus but without control stands; and (3) unit or units without propelling motor or control apparatus but with control stands. The rules further defined multiple-unit service as the use of two or more of the above-described units coupled and with their propulsion equipment operated from a single control position. Following the issuance of the proposed rules and instructions, a prehearing conference was held on May 26, 1952, at which time the various rules and instructions were discussed and offers made for amendments or modifications thereof.

Subsequent to the prehearing conference and after considering the suggestions, amendments, and modifications offered at such conference, a notice of proposed rulemaking was issued on October 23, 1953, the purpose of which was to advise all common carriers by railroad subject to the Interstate Commerce Act and each national organization of railroad employees, as well as the public, that an investigation would be conducted under authority of the Locomotive Inspection Act, as amended, for a determination as to what rules and instructions should be prescribed for the inspection and testing of multiple-unit equipment. Not only did the notice specifically state the type of equipment to which the proposed rules were to apply, but attached to the notice were the tentatively proposed rules and instructions containing, among others, the following rule:

> 400. All rules and instructions contained herein apply to electrically operated units designed to carry freight and/or passenger traffic operated by a single set of controls which are defined thus:
>
> 1. Unit or units with propelling motors, control apparatus and one or more control stands;
>
> 2. Unit or units with propelling motors and control apparatus but without control stands;
>
> 3. Unit or units without propelling motors or control apparatus but with control stands.

This notice of proposed rulemaking was issued in full compliance with the provisions of the Administrative Procedure Act. The notice and proposed rules and instructions were published in the November 13, 1953, issue of the Federal Register, volume 18, page 7201.

At the time of the issuance of the notice of proposed rulemaking there was in effect an order of December 14, 1925, wherein the Commission prescribed rules and instructions for the inspection and testing of locomotives other than steam. Contained therein were definitions of a locomotive and a motorcar, the former being defined as "a self-propelled unit of equipment designed solely for moving equipment" and the latter was defined as "a self-propelled unit of equipment designed to carry freight or passenger traffic and is not to be considered a locomotive." Since the purpose of the proceeding herein is to prescribe rules and instructions similar to those prescribed by the order of December 14, 1925, except that they are to apply to multiple-unit equipment instead of locomotives other than steam, it was necessary to revise the definition of a locomotive to include multiple-unit equipment. Accordingly, an order was entered on October 23, 1953, concurrently with a notice of proposed rulemaking which amended the order of December 14, 1925, insofar as here pertinent, by changing the definition of a locomotive therein to read as follows:

> A locomotive is a self-propelled unit of equipment designed for moving other equipment and includes a self-propelled unit designed to carry freight and/or passenger traffic.

Following the issuance of the above order on October 23, 1953, the Hudson & Manhattan filed a petition dated December 21, 1953, for reconsideration and vacation of such order, renewing its objection to the jurisdiction of the Commission over its equipment and reserving its jurisdictional objection, based on its status as an exempt carrier.

This petition was denied by the report and order of May 18, 1954.

Subsequent to the issuance of the report and order of May 18, 1954, to which the Hudson & Manhattan directed its petition for reconsideration filed July 28, 1954, resulting in the reopening of this proceeding for further hearing, the contention that it was exempt as an interurban electric railway was no longer mentioned by petitioner in its pleadings or on brief. It is significant also to note that prior to the institution of the further hearing, this petitioner's creditors filed an involuntary petition in the United States District Court for the Southern District of New York against petitioner under chapter X of the Bankruptcy Act. This chapter, providing for corporate reorganization, excludes from its scope a railroad corporation authorized to file a petition under section 77 of the same act. In support of its motion to dismiss the above involuntary petition for lack of jurisdiction, petitioner's president and chairman of the board of directors filed an affidavit dated September 24, 1954, in which he stated that petitioner is a common carrier by railroad engaged in the transportation of persons in interstate commerce and that it does not come within the interurban electric railway exception but that if it does, it is nevertheless a part of a general railroad system of transporation operated by The Pennsylvania Railroad Company. Subsequent to the further hearing in the instant proceeding, it has come to the Commission's attention that petitioner's motion to dismiss the chapter X reorganization proceeding was denied by the United States District Court and it declined to permit the reorganization proceeding to proceed under section 77. (126 F. Supp. 359.) In this respect, attention is called to the fact that the ruling of the court that petitioner is not an interurban electric railway not operated as a part of a general railroad system of transportation was only for the purpose or reorganization, and there was no hold-

ing that it was exempt from the provisions of the Locomotive Inspection Act.

As previously stated, the petition for reconsideration of the Hudson & Manhattan which gave rise to the reopening of this proceeding for further hearing presents two jurisdictional or procedural propositions. First, that the provisions of the Locomotive Inspection Act, as amended, do not apply to multiple-unit equipment of the type operated by petitioner and, second, that the steps taken in changing the definition of a locomotive by the order of October 23, 1953, were not in compliance with the Administrative Procedure Act.

Consideration will first be given to the propositions in the order presented. It is petitioner's contention that its multiple units are not locomotives and in support thereof refers to the history of the Locomotive Inspection Act, urging that it was not the intent of Congress to include such equipment within the provisions of the act. Particular reference is made to the amendment of June 7, 1924.

There is no dispute over the fact that the original Locomotive Inspection Act applied to locomotives propelled by steam power since section 2 thereof specifically stated that it applied to any locomotive "engine propelled by steam power in moving interstate or foreign traffic." The amendment of March 4, 1915, likewise applied to steam locomotives but the application of the act was extended to include the entire locomotive and tender and all parts and appurtenances thereof. The amendment of June 7, 1924, not only provided for increases in the number and salaries of inspectors but, in addition, removed the restriction of its application to locomotives propelled by steam power and made the law apply to all locomotives regardless of the power by which they are propelled. By these amendments Congress neither specifically included nor excluded multiple-unit equipment, and its intent in this respect must be gathered from the language used in the act

and a comparison made of it with other laws on the same subject. The language in the act is all-inclusive, and considering its purpose, which is to promote the safety of employees and travelers upon railroads, the words "any locomotive" as used in section 2 must be construed as intended to encompass all of the motive equipment of any carrier subject to the act. The broad purpose of the Locomotive Inspection Act has been stated in a number of cases, including *Lilly* v. *Grand Trunk W. R. Co.*, 317 U.S. 481, 486, where the Court said:

> The Act, like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment.

Under authority of section 25 of the Interstate Commerce Act, rules, standards, and instructions for the installation, inspection, maintenance, and repair of automatic block-signal systems, interlocking, traffic control systems, automatic train stop, train control, and cab signal systems and other similar appliances, methods, and systems, were prescribed in Ex Parte No. 171 (278 I.C.C. 267, 307). In that proceeding which also deals with the promotion of safety of employees and travelers upon railroads, a locomotive is defined as a self-propelled unit of equipment which can be used in train service. The rules and instructions provided therein, which clearly include multiple-unit equipment, have been consistently applied to this petitioner and it readily admits it has never questioned their applicability.

Another reason advanced by petitioner that its multiple units are not locomotives is their dissimilarity from locomotives. It takes the position that locomotives are self-propelled units of equipment designed solely for moving other equipment which may be powered by a diesel engine, by electricity, steam, or other means, whereas its multiple units which are powered by electricity from a third rail

have the appearance of an ordinary railroad car and usually have all the accommodations found in a passenger railroad car. Appearance clearly cannot determine the classification into which this type of equipment should be placed. Although petitioner's equipment has accommodation for passengers, it nevertheless is a self-propelled unit of equipment capable of moving other equipment. The definition of a locomotive submitted by petitioner in this respect is essentially the same as the Commission's definition in "Classification of Train-Miles, Locomotive-Miles and Car-Miles for Steam Roads." The definition of a locomotive as contained in such classification is only for accounting and other reporting requirements, and a definition as used for such purposes cannot be construed as also applicable to issues for determination under the Locomotive Inspection Act involving entirely unrelated matters.

For the foregoing reasons, it must be concluded that petitioner's multiple-unit equipment is included within the definition of a locomotive and is subject to the jurisdiction of the Commission under the Locomotive Inspection Act. Petitioner's motion in this respect is, therefore, denied.